UNITED
NATIONS

AT

Administrative Tribunal

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LIMITED

AT/DEC/704
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 704

Case No. 768: EL-BATTOUTY

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Sen, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Maher El-Battouty, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 30 November 1993;

Whereas, on 23 November 1993, the Applicant filed an application requesting the Tribunal, inter alia, to order:

"...

- Restitution of his professional status as indicated in his performance reports prior to the abuse of which he was a victim.

- Recognition and implementation of his functions as specified in his job description (...).

- Recognition of his seniority in ORES with what it entails, without discrimination by reasons of mother tongue.

- Adequate compensation for all forms of damage and psychological anguish suffered by him during years of abuse.

> [To make] a pronouncement against the unethical practices, as defamatory petitions and other practices, used by supervisors in the United Nations."

Whereas the Respondent filed his answer on 6 July 1994;

Whereas the Applicant filed written observations on 27 February 1995;

Whereas the facts in the case are as follows:

The Applicant, an Egyptian national, entered the service of the United Nations on 19 March 1978, as an Associate Translator at the P-2, step II level, in the Department of Conference Services (DCS). On 3 October 1979, he received a probationary appointment and on 1 March 1980, he was promoted to the P-3 level. On 1 July 1980, his appointment was converted to a permanent one. With effect from 16 March 1981, the Applicant was transferred to the Official Records Editing Section (ORES) as an Editor. He was promoted to the P-4 level with effect from 1 April 1982.

In a memorandum to the Director, Recruitment and Placement Division, Office of Human Resources Management, dated 2 February 1992, the Applicant submitted his candidacy for the post of Chief, ORES, which was to become vacant upon the forthcoming retirement of the incumbent.

In a memorandum dated 10 June 1992, the Director, Editorial and Official Records Division (EORD), DCS, informed the Chief, Editorial Service, EORD, of his decision to appoint another staff member as Officer-in-Charge of ORES upon the retirement of the Chief, ORES.

On 14 August 1992, the Applicant requested administrative review of the decision not to appoint him Officer-in-Charge and of other practices within the Department. In a reply dated 16 September 1992, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that the appointment of the other staff member was a continuation of the practice during the past four years of designating her Officer-in-Charge whenever the Chief was absent.

On 19 October 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 2 November 1992, the panel constituted to consider the Applicant's rebuttal recommended the deletion of certain comments made in the performance evaluation report (PER) and the upgrading of several ratings of his PER, covering the period from 1 October 1986 through 29 February 1992.

On 5 April 1993, the JAB adopted its report. Its considerations and recommendations read, in part, as follows:

> "Considerations and recommendations
>
> ...
>
> 27. The Panel noted that the decision of the Director to appoint another staff member as Officer-in-Charge, is a discretionary one and the Appellant did not produce the evidence to support his claim that the decision was made in bad faith or was motivated by prejudice or any other extraneous factor. The Panel recalled however that normally it is the highest ranking member of a Unit who serves as Officer-in-Charge, in the absence of the Chief; or, where there are several staff members at the same level, the position is rotated. The Panel, therefore, wondered why the Appellant had never been named to serve as Officer-in-Charge, and whether this has anything to do with the Appellant's performance or the language group the Appellant belongs to.
>
> 28. The Panel asked for the current status of the post in question (...). It noted from the Respondent's response dated 17 March 1993 (...) that the post in question would be filled upon completion of the 1992 promotion exercise, and that 'OCS [Office of Conference Services] has recommended a staff member for promotion to P-5, the level at which the post of Chief, ORES, has been classified; although seniority was not the primary consideration in our recommendation, the staff member recommended for promotion happens to have more in-service and in-grade seniority than the Applicant'.
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> 29. On 16 February 1993, the Panel was informed by the Appellant (...) that the report of the rebuttal panel on the Appellant's performance evaluation review, was appraised by the Director, OCS, on 31 December 1992, and that all items rebutted had been upgraded and the derogatory comments deleted.
>
> 30. The Panel felt that the Performance Evaluation Report, together with the Director's appraisal, were vital to the Appellant receiving full and fair consideration by the APB

and therefore, recommends that the amended and completed performance evaluation review be placed before the appointment and promotion bodies before it completes its consideration of the 1992 promotion exercise for the P-4 to P-5 level in OCS.

31. The Panel noted that it was not within its competence to deal with the Appellant's request that the job description for Chief of the Arabic Group in ORES be changed so that the status of Arabic in ORES be made equal to that of English, French and Spanish, but felt it will be useful if the Administration look into the matter."

On 15 April 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He wishes to affirm that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. He agrees with the finding of the Board that the decision to appoint a staff member other than yourself is a discretionary one and that you did not produce evidence to support your claim that the decision was made in bad faith or was motivated by prejudice or any other extraneous factor ...

With regard to the Board's observation in paragraph 31 of the report, the Secretary-General wishes to remind that the revised job description approved on 16 April 1992, removed the prior condition and now requires excellent command of English, French and at least one other official language of the United Nations".

On 23 November 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to appoint him as Officer-in-Charge of ORES was discriminatory, as it was based on prejudice against the Arabic Group and a preference for native English speakers.

2. As the most senior staff member in ORES, the Applicant should have been appointed Officer-in-Charge of ORES.

Whereas the Respondent's principal contention is:

The decision not to appoint the Applicant as Officer-in-Charge of ORES was within the discretionary powers of the Administration and did not violate his rights. That decision was not tainted by prejudice or other improper motives.

The Tribunal, having deliberated from 5 to 28 July 1995, now pronounces the following judgement:

I. The main issue before the Tribunal is whether the Applicant was denied the opportunity to serve as Officer-in-Charge of the Official Records Editing Section (ORES) because of prejudice. The Applicant asserts that he was not only a victim of a conspiracy by some of his senior colleagues because of his being an Arab, but that he was systematically treated badly, without justification, by the outgoing chief of his section. Of the documentation he has produced to sustain his claim, more than half concerns two other staff members and an audit report of 1991 on the issuance of official records. Nonetheless, the Tribunal has examined all the material before it and concludes that while there is much evidence of the friction caused by the internal differences in ORES, there is nothing to establish that the Applicant was subjected to discrimination because he was an Arab or because his mother tongue was Arabic.

II. Even the observations of the JAB that "it would be useful to look into the job description" of the Applicant and the Respondent's comment that the system prevailing at the time constituted simply a measure of administrative efficiency and convenience, are far removed from any implication of ethnic discrimination against the Applicant.

III. In defending his decision not to select, even temporarily, the Applicant to be the Chief of the Section, the Respondent relies

entirely on his discretion - which has consistently been upheld by the Tribunal on all matters relating to posting and promotion, provided always that there was no bias, prejudice or other extraneous factors to vitiate his decision. The Respondent's failure to forward the Applicant's revised performance assessment to the appointment and promotion bodies, and his suggestion that the Applicant take such action himself, may be open to criticism, but does not constitute, in the view of the Tribunal, evidence of bias.

IV. The Tribunal notes that the latest performance evaluation report on the Applicant was prepared by the outgoing Chief of the Section on 20 March 1992, covering a period of 5 years and 5 months (1 October 1986 to 29 February 1992). No explanation has been given by the Respondent for the failure to submit regular reports and for preparing a report covering such a long period of time. This report was unfavourable to the Applicant and was rebutted by him, while earlier reports, from 1981-1986, had been generally excellent. The panel, which upheld his rebuttal in general, deplored the former Chief of the Section's refusal to attend and her failure to defend her judgement of the Applicant's performance. The Tribunal will not comment on the refusal by the former Chief of the Section to attend, as she had retired from the Organization.

VII. The Tribunal has considered these developments carefully and has come to the conclusion that no complaints of discrimination on ethnic or language grounds can be upheld. Furthermore, it concludes that in spite of procedural delays, irregularities and some indication of strained personal relations in the section, no evidence has been produced which could be construed as a violation of the Applicant's rights or a demonstration of prejudice. As a result, the Applicant's contention that his non-selection as Officer-in-Charge of Section was tainted by prejudice and extraneous considerations cannot be sustained.

VIII. Consequently, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-Presidemt

Mikuin Leliel BALANDA
Member

Geneva, 28 July 1995

R. ~~Maria~~ VICIEN-MILBURN
Executive Secretary